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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

Number 11, Original

STATE OF MISSISSIPPI,
Plaintiff

versus

STATE OF LOUISIANA,
Defendant

Original Brief on Exceptions to the Special Master's Report in Behalf of the State of Louisiana

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INDEX

SUBJECT INDEX

Page

Jurisdiction 1

Statement of the Case 1

Part A—Diamond Island Towhead Area

Questions Presented for Review 2

Statement of the Case Applicable to Diamond Island Towhead Area 4

Comments on Size of Record with Reference to Diamond Island Towhead Area 5

Argument Applicable to Diamond Island Towhead Area 7

I. Location of Boundary When Water Ceased to Flow in Abandoned Channel 7

II. Even Though Boundary Was Fixed a Mile and a Fraction Upstream from Island, Such Boundary Followed the Varying Course of the Stream Changed by Erosion and Accretion 13

III. Division of Accretions 18

IV. Boundary in Oak Bend Applicable to Diamond Island Towhead Area 26

Conclusion 29

Part B—Diamond Point Area

Questions Presented for Review 30

Statement of the Case 31

Argument Applicable to Southern Boundary of Diamond Point 32

I. Burden of Proof 32

II. Mississippi Has Not Carried Burden of Proof as to Location of Island Below Diamond Point 33

Conclusion 43

Certificate 44

TABLE OF CASES CITED

Page

Arkansas v. Tennessee, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638 .... 2, 3, 5, 7, 9, 12, 13, 15, 20, 25, 26, 29

Kansas v. Missouri, 322 U.S. 215, 64 S.Ct. 975, 88 L.Ed. 1234 32

Nebraska v. Iowa, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186 17

Sharp & Stricker v. Learned, 32 So. 2d 141 22

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To the Honorable Supreme Court of the
United States of America:

JURISDICTION

This is an original action brought by the State of Mississippi against the State of Louisiana to establish the boundary between them in two separate and distinct areas. Jurisdiction is confirmed by Article 3 Section 2 of the Constitution and by Section 1251, Title 28 U. S. C. A.

STATEMENT OF THE CASE

The case has been heard by the Special Master appointed (346 U.S. 862, 98 L.Ed. 60, 74 S.Ct. 102) by this Court, his report filed, and this brief is in support of the exceptions filed by the State of Louisiana to the said report.

Inasmuch as there are two definite and separate areas involved, they will be treated separately, just as the Special Master has done. The two areas were spoken of by the Master as the (1) Diamond Island Towhead Area and the (2) Diamond Point Area.

PART A.

DIAMOND ISLAND TOWHEAD AREA

Questions Presented for Review

1. (a) In what varying location of the old channel is the boundary to be fixed in such old channel around Diamond Island, inasmuch as it is not disputed that the island was formed as a result of an avulsive cut-off? This Court having held (*Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638) that "So long as the old channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion," whilst the Special Master, though he quoted such law as fixed by this Court, nevertheless, ignored the same, and held "that where the old channel . . . can no longer be **used for navigation**" and (apparently and/or) "no water can enter the channel **at low stages** of the river" the boundary becomes fixed in the old channel (Report 10).

(b) The same legal question is also applicable to the old channel at Oak Bend of the Mississippi River, the southerly boundary of Diamond Island Towhead Area.

2. In the event the boundary is fixed in the case of an avulsion, in the old channel when "it can no longer be used for navigation" and/or when "no water can enter the chan-

nel at low stages," then where is the boundary to be fixed in the Mississippi River upstream from Diamond Island, when the island was formed by an avulsion? Though this Court has said "It is settled beyond the possibility of dispute that where running streams are the boundaries between states, . . . , that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; . . ." (*Arkansas v. Tennessee*, supra, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638), nevertheless, the Special Master by use of a new theory developed by expert witnesses testifying in behalf of the State of Mississippi of "divided thalweg" or "point of divergence of thalwegs," repudiates what this Court so said was "settled beyond the possibility of dispute" and freezes the boundary and makes it fixed and not subject to change in the river for a distance of about a mile and a fraction upstream from the head of Diamond Island to a "Point S, as shown on Exhibit 5 to Smith's testimony" (Report 41) despite the fact that this portion of the bed and channel of the Mississippi River (for the distance of this mile and a fraction upstream from Diamond Island) was subsequently changed by the natural and gradual processes known as erosion and accretion.

3. To which state do accretions belong when they tailed down in front of Diamond Island, admittedly Mississippi territory, without being formed to such State, but being formed to, and an extension of, Bedford Bar, admittedly Louisiana territory?

4. In the event the accretions formed in front of Diamond Island are considered Mississippi territory, the question is then whether the point of beginning, or boundary on the

river, for the division of the accretions should be the hea of the final thalweg of the old channel as shown on Louisiana Exhibit No. 36 (R. 1325) or the "Point S" as held by the Master; this question being controlled by the answer to questions one and two above.

Statement of the Case Applicable to Diamond Island Towhead Area

The history of this area, claimed by Mississippi, and admitted by Louisiana, is that a point bar built out from the State of Mississippi (left bank) called Diamond Point, and a tip of such bar was cut off by an avulsion, forming what is known as Diamond Island about 1864-1866 (Report 16). Subsequently, Diamond Point, by the processes of erosion and accretion in the Mississippi River, moved in a westerly-southwesterly direction and left behind on its right bank a remnant of this Diamond Island. This Diamond Island, in accordance with the well settled jurisprudence of this Court, having been formed by an avulsive cut-off, remained a part of the State of Mississippi, though it is now on the right bank or Louisiana side of the river.

The main question to be adjudicated is the boundary of such Diamond Island; the boundary to the north and west of the island not being disputed. The next question is to determine which state owns the vast mass of accretions (approximately 7,500 acres) formed to the right bank of the river, in the vicinity of and to the east and south of this island, and to do so it is first requisite that the boundary of the island to the east (upstream boundary) be located. The legal conclusions of the Special Master as to the location of the boundary to the east or upstream from the island are excepted to by the State of Louisiana as being contrary to the jurisprudence of this Court, settled in *Arkansas v. Tennessee*, supra, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638.

In the event the east or upstream boundary of the island was located approximately a mile and a fraction upstream from the island in the channel, when the old channel closed, then the Court must determine what happened to the boundary in the vicinity of this mile and a fraction upstream. This legal question is also purely a legal one and is controlled by the jurisprudence of this Court recognized as being "settled beyond the possibility of dispute" in *Arkansas v. Tennessee*, supra.

The Court is to also determine to whom the accretions in front of the island belong; and alternatively, the point of beginning on the river for a division of such accretions.

The remaining question is the southern boundary of such accretions, which is in another old channel of the river (Oak Bend) left after the artificial avulsive cut-off in 1933, through the neck as it then existed of Diamond Point. The same legal question is again presented as to when the boundary in this channel is to become fixed.

Comments on Size of Record with Reference to Diamond Island Towhead Area

Though the record in this case appears mountainous, we believe that it will only be necessary for this Court to consider a very small portion thereof, in connection with the Diamond Island Towhead Area, for the following need not be considered on this phase, viz:

(a) The large portion of the exhibits (approximately half), and a large part of the evidence in the record, brief, can only be defended on the theory that it was the head of the channel around the island **when navigation therein at some low water stages ceased**, and that such theory does violence to the holding of this Court in *Arkansas v. Tennessee*, supra, that

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

There is a sound and logical reason why the holding of this Court in *Arkansas v. Tennessee*, supra, was adopted and should be adhered to. Such an important boundary as one between states should not be left to the conjecture indulged in by the Special Master in arriving at his "Point S," which is premised on the time when navigation at the lowest of low water stages around the island ceased. Whereas, in accordance with the ruling of this Court in such cited case, the boundary follows the stream (so long as the stream remains a running one), and is subject to be changed by erosion and accretion, and there is no need for conjecture as to its location, for as it migrates due to erosion and accretion, its location at all times can be seen. There is then no need for geological experts to find such a boundary, for even after the stream has ceased to be a running one, its old bed can readily be found and surveyed, just as the State of Louisiana did in this case, as represented by its survey on the ground today of the old abandoned channel (Louisiana Exhibit No. 36, R. 1325). If this Court were to change the law as heretofore settled by it to that adopted by the Special Master, then in every case of an avulsion on the Mississippi River, it would take a lawsuit, ending largely in conjecture, to locate the boundary. Whereas, all of which have to do with the Diamond Point Area.

(b) Another very large portion of the remaining exhibits, which have to do with the admitted fact, that Diamond Island was originally formed by an avulsive cut-off.

(c) Another very large portion of the remaining exhibits and testimony which have to do with possession.

In the main, this portion of the case will turn on legal questions, for the almost conclusive facts, in connection with these legal questions, are shown on one particular survey by the Mississippi River Commission, the data for which was obtained in 1878-80 and used by the Commission for two separate charts showing two stages of the water. This survey is extremely important, even if not conclusive as to the facts, in reaching a decision of this case, and was so recognized by the two states; so much so, that it was offered many times by each state and given numerous exhibit numbers, among others, viz:

(a) Complainant's Exhibit No. 9 (R. 110)

(b) Complainant's Exhibit No. 10 (R. 110)

(c) Complainant's Exhibit No. 11 (R. 110)

(d) Fisk No. 5 (R. 79)

(e) Fisk No. 6 (R. 143)

(f) Fisk No. 12 (R. 314)

(g) Smith No. 2 (R. 665)

(h) Smith No. 15 (R. 1457)

(i) La. Cross.-Exam. Fisk No. 4, 4A and 4B (R. 328-9) if this Court merely affirms its already established jurisprudence, then a surveying party can go out in the field and locate the old abandoned channel, as was done here, which will be the boundary.

II.

EVEN THOUGH BOUNDARY WAS FIXED A MILE AND A FRACTION UPSTREAM FROM ISLAND, SUCH BOUNDARY FOLLOWED THE VARYING COURSE OF THE STREAM CHANGED BY EROSION AND ACCRETION.

There is yet another well settled legal proposition which the Special Master's legal conclusion seems counter to. The Master again cited this law but ignored it. That is, as stated in *Arkansas v. Tennessee*, supra.

> "It is settled beyond the possibility of dispute that where running streams are the boundaries between states, . . . , that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; . . . ."

To see how this holding of the Master runs into the very teeth of the above quoted law, which "is settled beyond the possibility of dispute," we again refer the Court to Plate I of this brief, which shows the Master's "Point S" about a mile and a fraction upstream from the head of the island. The right bank of the Mississippi River (Louisiana territory) had accretions formed to it for this mile and a fraction upstream from the island, which accretions followed the river as its bed and channel were successively changed by the

(j) La. Cross.-Exam. Smith No. 1 (R. 840)

(k) La. Exhibit No. 2, Plate 7 (R. 891)

(l) La. Exhibit No. 16 (R. 1002)

Argument Applicable to Diamond Island Towhead Area

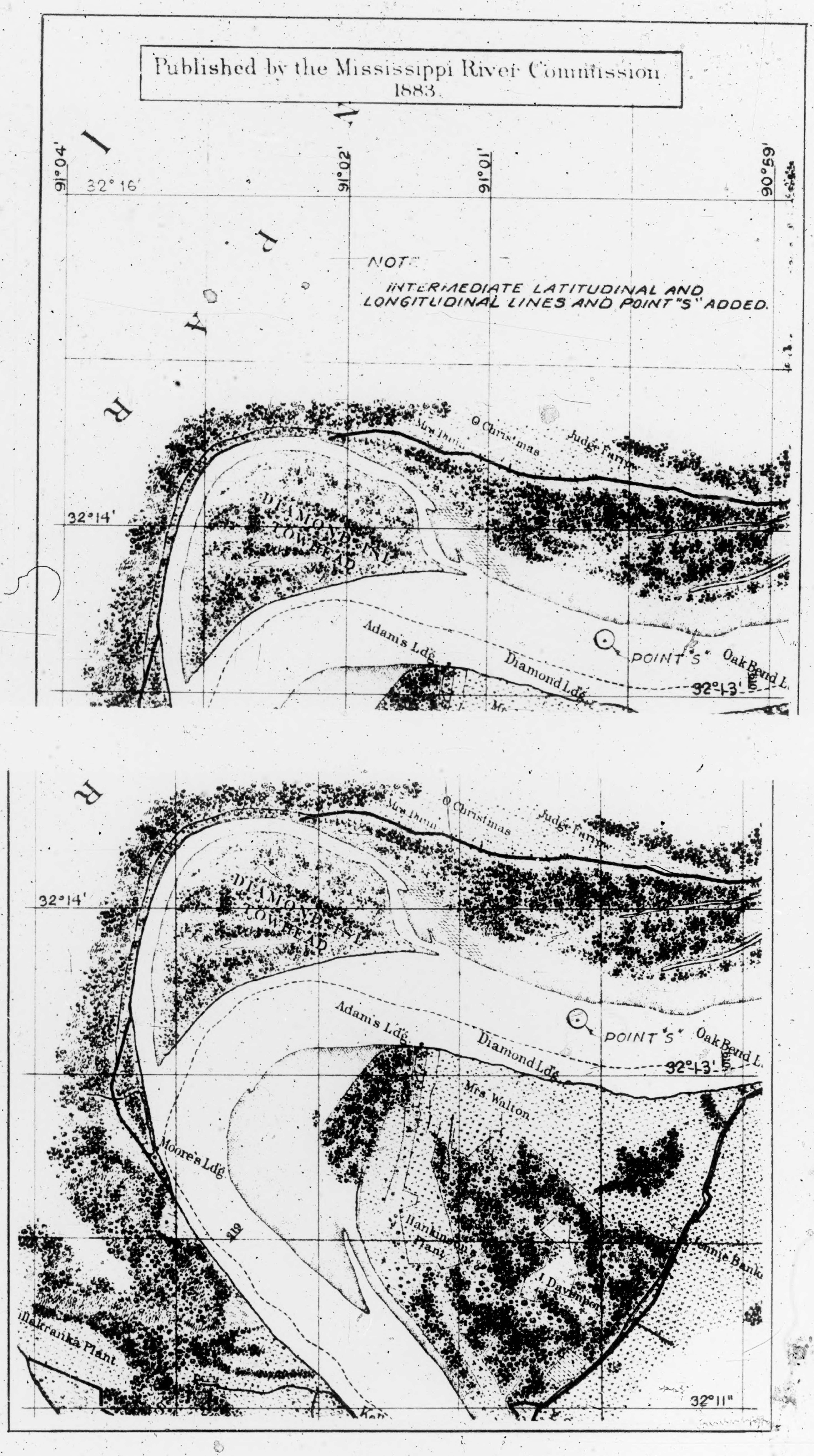
I.

LOCATION OF BOUNDARY WHEN WATER CEASED TO FLOW IN ABANDONED CHANNEL.

The argument in behalf of the State of Louisiana is that the jurisprudence of this Court on the main legal issue in this case was settled long ago in the case of *Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638, which held that where a stream is a boundary between states, and the stream leaves its former bed and establishes a new one by an avulsion, the boundary remains in the old channel and

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

To graphically demonstrate Louisiana's position, we have taken an excerpt from one of the charts of the all important survey above mentioned, and we will refer to it simply as La. Cross-Exam. Fisk No. 4 (R. 328) (though given numerous other exhibit numbers), as that was when its vital importance was first developed in the record. This excerpt is shown on the opposite page as Plate I. (Plate I-A is the full chart.) By reference to the notes on Exhibits 4, 4-A, and 4-B (R. 3289) and comparison thereof to the notes on Chart 49, which we will refer to as Complainant's Exhibit No. 9 (R.



Published by the Mississippi River Commission
1883.

NOTE
INTERMEDIATE LATITUDINAL AND
LONGITUDINAL LINES AND POINT "S" ADDED.

91°04'
32°16'
91°02'
91°01'
90°59'
I
N
P
A
R
R
32°14'
O Christmas
Mrs Dunn
Judge Farm
DIAMOND ISL
COWHEAD
Adam's Ldg.
Diamond Ldg.
POINT "S"
Oak Bend L.
32°13'
Mrs. Walton
Moore's Ldg.
Hankinson Plant
J. Davenport
Jennie Bank
Killiekranka Plant
32°11"

PLATE NO.1

EXCERPT FROM PLATE NO. 1A
(EXHIBIT LA. CROSS EXAM. FISK NO.4 - R 328-9)

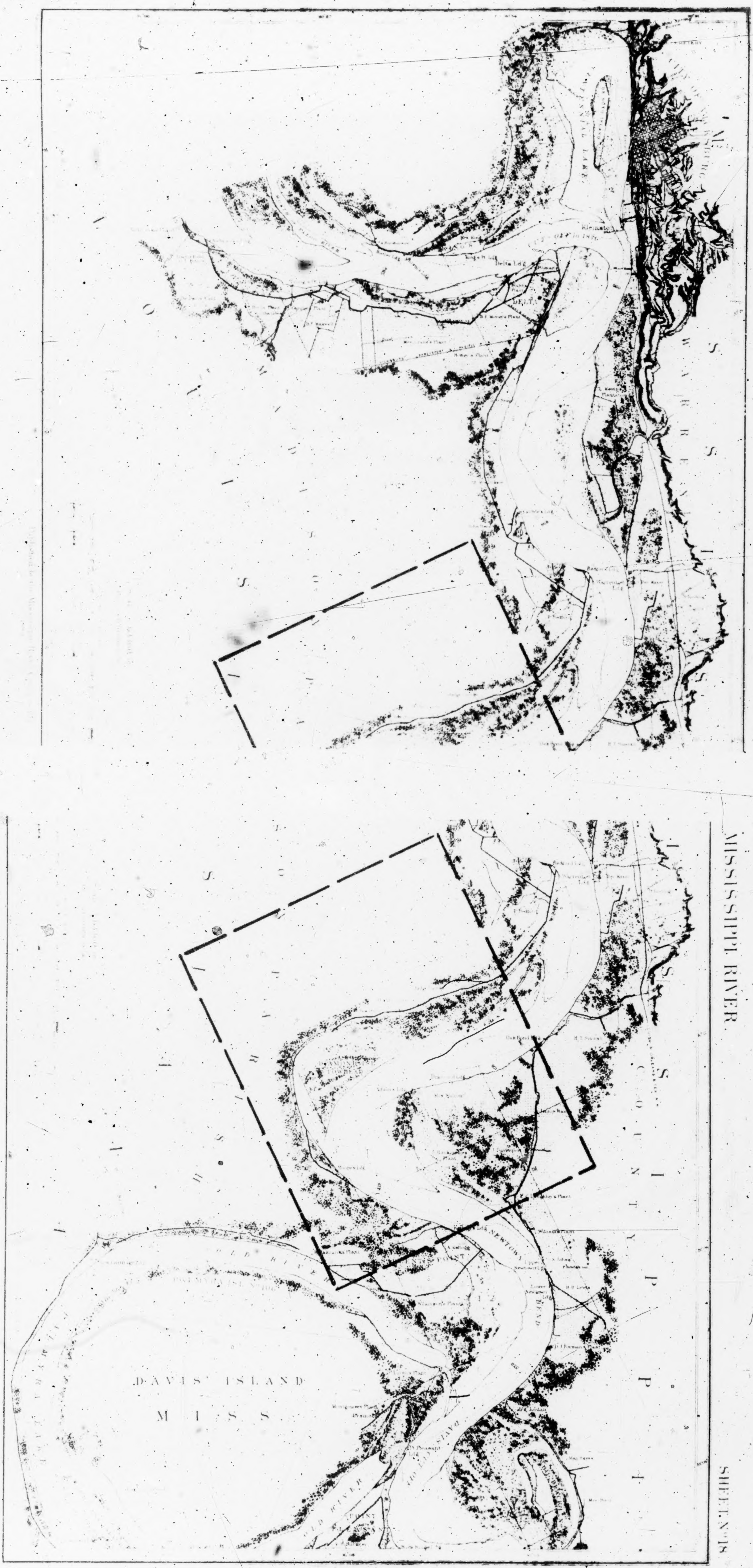

MISSISSIPPI RIVER
MISSISSIPPI RIVER
DAVIS' ISLAND
MISS
SHEET No 18

PLATE NO. 1A
(EXHIBIT LA. CROSS EXAM. FISK NO. 4-R. 328-9)

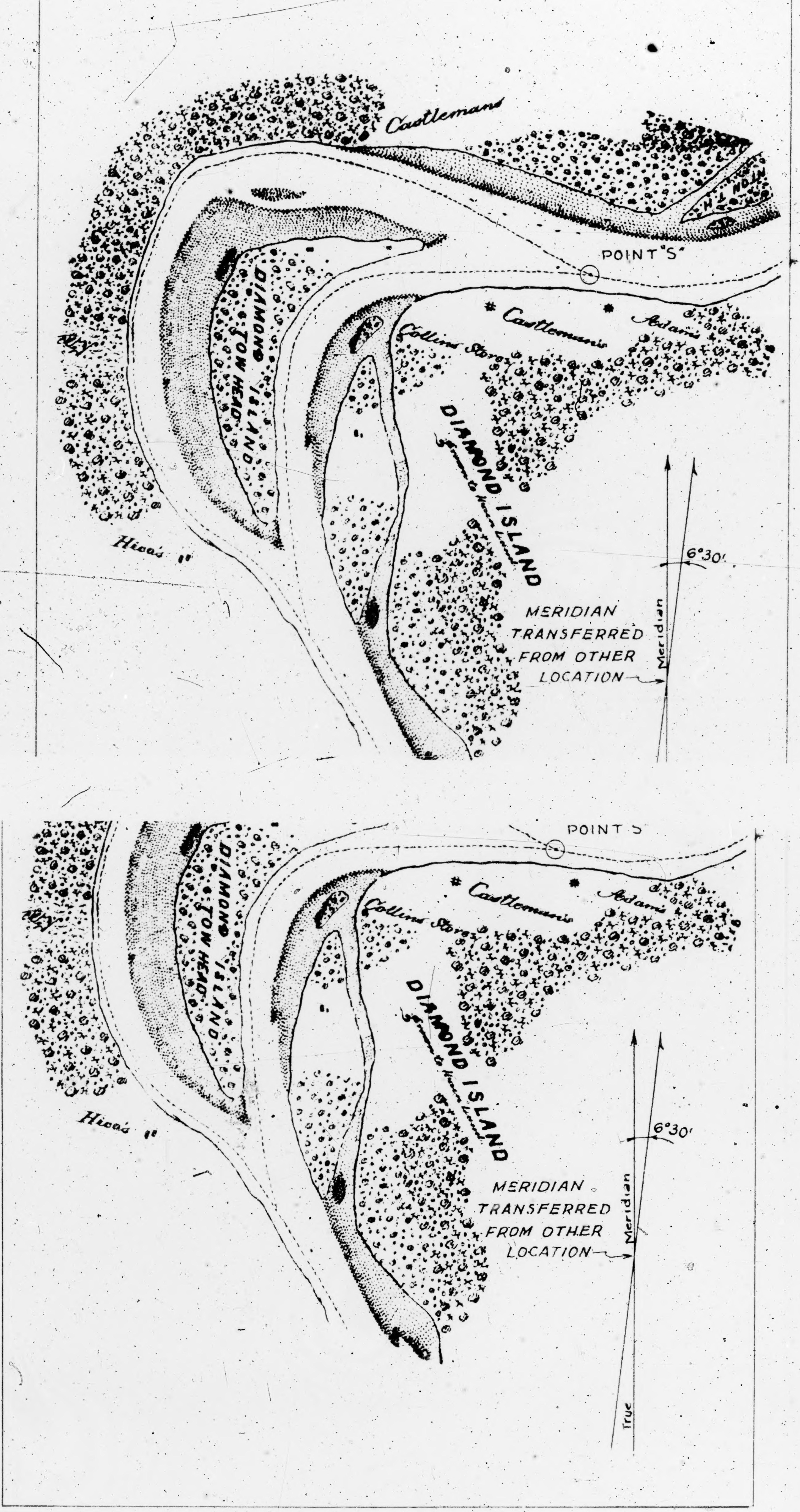

Castlemans
POINT'S'
Castleman's
Adams
Collins Store
DIAMOND ISLAND
DIAMOND TOW HEAD ISLAND
Hico's
MERIDIAN TRANSFERRED FROM OTHER LOCATION
Meridian
6°30'
POINT S
True

PLATE NO. II
EXCERPT FROM SUTER'S PLATE NO. 20
(EXCERPT-COMPLAINANT'S EXHIBIT NO. 8, R-110)

erosion to the left bank and the accretions to the right bank (Bedford Bar) in this portion of the channel upstream from the island, as the river migrated to the west. How these accretion bars were formed to Bedford Bar—all being attached to Louisiana shore upstream from the last channel around the island—is graphically pictured by the plates in La. Exhibit Number 2 (R. 891). The geologic report, State of Louisiana Exhibit Number 1 (R. 891), commencing at page 12 thereof, details how these accretion bars were formed. The testimony of the geologists, especially Durham (R. 1033 et seq.) also tells the history of the formation of these accretion bars.

Therefore, when the right bank of the Mississippi River, by accretions thereto, caused that portion of the channel from the head of Diamond Island (or the head of the old channel) upstream to "Point S" to migrate in a westerly direction by accretions on one side of the river and erosion on the other, the boundary that was in this channel (which is the channel upstream from the island), under this law, followed the new successive positions of the bed and the channel as they were changed. Of course, the migration by erosion and accretion of the mile and a fraction of the channel upstream from the island would and could not affect the boundary in the old channel around the island.

The Master further devoted so much of his report to the qualifications of the experts, as well as to their opinions on the method of closing of channels after an avulsion, that we feel called upon to comment thereon. We do this as a secondary proposition, for primarily we submit that the very basis for the Master's opinion is an erroneous legal belief and in

110) (though given numerous other exhibit numbers), it will be seen that the same survey of 1878-1880 by the Mississippi River Commission was used as the basis for both charts. By comparison of the notes on this Chart 49 with the notes on La. Cross-Exam. Fisk No. 4, 4-A and 4-B, it is found that the plane of water used in Chart 49 is a few feet lower than the plane of water (both, however, being low water stages) used in the excerpt of the chart here shown as Plate I.

In the excerpt of the chart shown (Plate I), Diamond Island Towhead can readily be seen as an island **with water flowing in both channels around the island**, with a minimum width of 300 feet (R. 324). And a 300 foot wide river is still quite some river. Whilst in Chart 49, the channel to the north of the island, at its entrance, is shown as closed. The difference in these charts is because of the few feet difference in the plane of water shown on the two charts—both planes, however, being low water stages of the river.

The Special Master held, viz:

> "I believe that when the old channel . . . can no longer be **used for navigation** except in times of flood it no longer has a thalweg. When . . . no water can enter the channel **at low stages** of the river, . . . there is then no current in the old channel and the water has become stagnant." (Report 10) (Emphasis supplied)

Thus, the Master adopts a different legal test as to when the boundary in an old channel, because of an avulsion, "is still subject to be changed" or becomes fixed. He says when it can no longer "be used for navigation" "at low stages" of water, the boundary becomes forever fixed and not subject to change. This holding conflicts with the holding of this conflict with the jurisprudence of the Court as fixed in *Arkansas v. Tennessee*, supra.

Louisiana witnesses located the "old channel" of the Mississippi River around Diamond Island by its present day survey (La. Exhibit No. 36—R. 1325). This last channel is still present on the ground. The main witness (Fisk) for the State of Mississippi so also located this last channel, see particularly his Plates 8 and 10 of Fisk 4 (R. 46), in connection with his report (Fisk 4), wherein he locates this same last channel. The difference between the opinion of Fisk and Louisiana's contentions are, therefore, only legal; that is, shall the last low water flow for navigation be the test when the boundary in the stream becomes fixed, **or** shall it be when that channel is no longer a running stream and no longer subject to change by erosion and accretion as fixed in *Arkansas v. Tennessee?* Therefore, the fact that Fisk also said that there was another channel where the stream flowed when there was a **50% flow around the island**, or another channel when **no low water flow** was around the island, is of no moment, if the **legal test** is that

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

And further, if the last channel wherein the stream last flowed, as found by Fisk, is the same last channel that Louisiana contends for, as present on the ground and as so mapped, the "method of closing channels" advocated by Fisk is of no real moment here, even though some of his testimony conflicted with his report.

With reference to the method of closing channels advanced by the witness Smith, we submit that he was so

Court in *Arkansas v. Tennessee*, supra, (which the Master cited but disregarded) wherein this Court said,

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

To demonstrate forcefully the two conflicting legal positions, that is, the one by this Court and the one by the Special Master, we have superimposed the approximate position of "Point S," as fixed by the Special Master, on Plate I of this brief (Report 41). This "Point S" is approximately one and a fraction miles upstream from the head of Diamond Island Towhead and the head of the old channel as shown on this plate.

In accordance with the survey made in 1878-80, depicted on Plate I of this brief, the current was even at that time yet flowing in the old channel at a stage of low water that was only a few feet higher than the lowest low water. Of course, this stage of water was "about one-third of the extreme oscillation above low water; . . . ." See Exhibit Fisk Cross-Exam. No. 4-B, note (R. 329); or say, about nine feet above the water plane shown on Chart 49. **This is a stage of low water, and not a "flood stage" as intimated by the Master.**

Thus, the issue is square—is it when an old channel can no longer be used **for navigation at low water** that the boundary marked by it then becomes fixed; or is it "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."?

The evidence was not contradicted that the processes of erosion and accretion do not take place, in the main, at low stages of the river, but occur at high water stages.

The evidence shows that this old abandoned channel around this island, as it exists on the ground today (Louisiana Exhibit No. 36; R. 1325), is almost identical in its location with the small channel of the Mississippi River depicted on Plate I of this brief. This can only lead to the conclusion that the current ceased to flow around the island, and the processes of erosion and accretion in this old channel came to an end, shortly after the survey of 1878-80 by the Mississippi River Commission, which is depicted on Plate I of this brief. Of course, the southern part of the island, more than half thereof as shown by later maps, and as held by the Master, was eroded off, as the main channel migrated to the west.

To further demonstrate the erroneous legal theory adopted by the Special Master, we refer the Court to Plate II of this brief, which is an excerpt from Complainant's Exhibit No. 8 (R. 110), and which is referred to as Major Suter's Map of 1874. We have superimposed on this map the all important "Point S" as fixed by the Special Master. This point is the upstream end of the frozen boundary fixed by the Master. This survey was made approximately five years prior to the survey shown on Plate I of this brief. Again, we note that the greatest portion of this island shown on this survey, the southern portion thereof, that is, was eroded off when the river migrated to the west. And we also note the great distance this "Point S" is upstream from the island—as well as the enormous flow of water in both channels around the island.

thoroughly discounted on that subject, as to make his opinion on that point of no value. His theory was that the abandoned channel was filled by "its plugging on the bottom and gradually comes on up within that channel segment" (R. 1481). Smith said that Exhibit Smith No. 14 (R. 1440) prepared by him, **"reflected a normal pattern of the closing of a channel"** (R. 1480), and was how the Oak Bend Channel closed (R. 1481). Smith Exhibit No. 7 was his idea of a "reconstructed" channel (R. 1484), setting forth how **he thought** the channel around Diamond Island closed (R. 1482), and that,

> "Q And in your opinion, in neither case did the channel that you have depicted on your 'Exhibits No. 7 and 14' migrate in its closing?
>
> "A In my opinion, neither channel migrated with respect to the dead thalweg of any degree." (R. 1483)

In other words, Smith said that a channel just filled layer on top of layer (R. 1481) and that such channel did not migrate in the process of being abandoned. Smith said he used Range 95 in plotting Smith No. 7 (R. 1484). It is noted by reference to Smith Exhibit No. 4 that Range 95 on Oak Bend is some four miles downstream from the entrance to, or the head of, the old channel of Oak Bend. It being recognized by all that the entrance to or the head of an old channel is where the closing of such channel first takes place, why then did Mr. Smith select a point four miles down the channel from the entrance or head? To demonstrate why he so selected Range 95, and the absolute flat contradiction of his opinion, he was requested to plot Range 76 of Oak Bend, using the same surveys of 1932, 1937 and 1949 that he had used on Smith Exhibit No. 14. Remember his theory of

The Special Master used this chart of Major Suter, together with the report of Major Suter (R. 662) accompanying the chart, as the very foundation for his fixing "Point S," which he said was the head of the thalweg in the old channel when it was closed to navigation at low water. But observe the flow in the old channel which the Master says was "abandoned." The Master says,

> "The point which Major Suter showed on his Map No. 20 as the point where the thalwegs divided has been placed by Mr. Smith on Exhibit 5 to his testimony marked by the letter S." (Report 40)

Major Suter's report (R. 662) accompanying the Chart (Plate II) on which the Special Master bottomed his opinion said,

> ". . . the bend of Diamond Island sixteen miles below Vicksburg, filled up, and the channel established itself permanently in the chute." (Report 40)

The Master aptly observed when such argument was orally made by the State of Mississippi that Major Suter was interested only in navigation, and that when his report said the channel filled up, that he obviously meant that the channel filled up for all navigation purposes, such as steamboats of that day.

It is obvious from Plate II of this brief that the river channel was still running (1874) in both channels around the island, and it is also obvious from Plate I of this brief that the river was still running in both channels at some low water stages around the island in 1878-80, some five years later. The Master's "Point S" as located on Plate I of this channel closing was that the channel did not migrate, but was filled layer on top of layer (R. 1481). Smith's plot of Range 76 (La. Exhibit No. 46—R. 1485) did not show a filling of the channel layer on layer and contrary to his previous opinion, showed that the bed and channel migrated, and that the left bank of the river at Range 76 **migrated approximately 1700 feet** (R. 1486). To cap it all, Mr. Smith then retreated and testified, viz:

> "Q You would say then Oak Bend is not a normal closing of a channel?
>
> "A I would say that segment of Oak Bend is not." (R. 1480)

This, despite his previous testimony, viz:

> "Q And your opinion then is also that 'Smith Exhibit No. 14' demonstrated your opinion as to how Oak Bend channel closed?
>
> "A I beg your pardon, sir, but that's not my opinion,—that's the facts." (R. 1481)

But suppose that the boundary in the old channel did become fixed when there was no low water flow therein, wouldn't the old channel become a running stream when the waters rose and returned to their former bed, and wouldn't the boundary marked by such running stream "still be subject to be changed by erosion and accretion"? That is what this Court said in effect in the case of *State of Nebraska v. State of Iowa*, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186, viz:

> "By this selection of a new channel the boundary was not changed, and it remained, as it was prior to the avul-

sion, the center line of the old channel; and that **unless the waters of the river returned to their former bed,** became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel." (Emphasis supplied)

Thus, such case says that even if the water left a channel and the boundary in it became fixed, nevertheless, if "the waters of the river returned to their former bed," then so long as it was a running stream as the waters returned, the boundary marked by it would still be subject to be changed by erosion and accretion.

III.

DIVISION OF ACCRETIONS—DIAMOND ISLAND TOWHEAD AREA

Under either of the above discussed legal principles fixed by this Court, the question next to be decided is the disposition of the accretions formed to the right bank in the vicinity of Diamond Island. The Special Master, based on his "Point S," which is the point where the thalwegs were divided when **navigation "at low water"** around the island eased, held that the accretions to the Bedford Bar (admitedly Louisiana) for the distance of a mile and a fraction ipstream from the head of the island, were Mississippi lands, ind fixed the remaining accretions to Bedford Bar, upstream rom his "Point S," as Louisiana lands. He divided these ccretions by extending "Point S" at right angles to the thalveg of some later charted positions of the river. This "Point 5" as well as the said division line fixed by the Master are hown on Smith Exhibit No. 5 (R. 679). This same line was lso superimposed at the request of the Master on Plate Jumber 2 of Louisiana Exhibit Number 43 (R. 1398).

Louisiana contends that the head of the final thalweg of the old channel around Diamond Island is correctly shown on the survey, Louisiana Exhibit Number 36 (R. 1325), which survey is also shown as Plate 10 of Louisiana Exhibit Number 2 (R. 891). Louisiana submits that at the time this old channel, which is still visible on the ground today, ceased to be a running stream the boundary marked by it became there fixed because the processes of erosion and accretion were then at an end and the channel could no longer change. This point is approximately a mile and a fraction down stream from the "Point S" fixed by the Master. And this head of this surveyed old channel is the point where this surveyed old channel boundary commences. This old surveyed channel divided Mississippi from Louisiana, and it was not changed by erosion and accretion thereafterwards because it was not thereafterwards a running stream, as erosion and accretion can only take place in a running stream.

The Special Master placed great weight in locating his "Point S" on the testimony of an elderly former steamboat captain, who had known the area since "the early 1890's" (Report 35), to the effect that there was gravel on the Bedford Bar which was east (up river), in front of, and attached to, the head of Diamond Island where Bedford Bar formed over it. We fail to see the significance of this in view of other evidence in the record. Smith, witness for Mississippi, at one time said the significance of deposits of gravel showed scouring caused by the head of an island, viz:

> "A It would be deposited, I would think, during high stages **and at the point of divergence**." (R. 1453)

"point of divergence" referring to "Point S.". But note Smith's testimony on cross-examination (R. 1479) that the word "gravel," indicating deposits thereof, on the Mississippi River Commission Chart of the Diamond Island Towhead Area (La. Exhibit No. 15—R. 996), appeared in **eleven** widely scattered places over the vicinity of Diamond Island Towhead, and not near any claimed "point of divergence" (whatever significance might be attached to such phrase); **and Smith's explanation of the significance of such eleven deposits of gravel**, viz:

> "A I don't know the exact origin of that gravel, I am sure **it must be either in place or upstream.** When I say that, I don't see the depths up in the bend at this time that would indicate it's eroding into the heavy gravels that underlie the flood plain, so it may be in this bend above, it may be some place where there is a local condition that will cause deepening of the channel **or it could be that these gravels were deposited here under some other condition."** (R. 1480)

Of course, "Point S" as fixed by the Master, was primarily based on the last flow in the channel which permitted **navigation at low water**, and was not in accordance with *Arkansas v. Tennessee*, which fixed the test,

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

Louisiana made two alternative contentions with respect to the accretions. First, it contended that all of the accretions south of the island had been formed to that part of the Louisiana shore (Bedford Bar) up river from the head of the final thalweg in the old channel (the point of division or boundary between the states fronting on the river)—and such accretions had tailed down in front of, without being attached or connected to, the island. This first alternative is outlined by that part of Louisiana exhibit Number 1 (R. 891) which commences at page 12; and demonstrated by Plate I of Louisiana Exhibit Number 43 (R. 1398); and further detailed by the testimony, especially of Durham (R. 1033). There can be no question but that the bars did form by accretion to the right bank of Louisiana (Bedford Bar); up river from the head of the thalweg in the old channel, and that they did tail down as pictured in the plates and maps supporting Plate I of Louisiana Exhibit Number 43 (R. 1898). This being so, all of these bars belong to Louisiana.

The alternative contention of the State of Louisiana, with reference to these accretions, is that if the accretions that **formed in front of the island** (even though they had tailed down from the Louisiana shore) are to be considered Mississippi, and those accretions that are in front of Bedford Bar are Louisiana, then the accretions should be divided, by the right angle rule (which was the same rule adopted and used by the Master); however, Louisiana contends that the point of beginning for the division of the accretions and the application of the right angle rule should be **the head of the final thalweg of the old channel as shown on Louisiana Exhibit Number 36** (R. 1325), and **not** the **"Point S"** as held by the Master. Thus, the area in dispute under this alernative in this Court is shown on Plate 2 of Louisiana Exhibit Number 43 (R. 1398); such disputed area on such exhibit is the area shown in purple, that is, between the red line marked "Suter" which commences at "Point S," and the red line which commences at the head of the final thalweg of the old channel, which is just east of the head of the island. This area, which the Master has held is Mississippi land, and which we contend is Louisiana land, contains approximately 3000 acres of land.

The above approximately 3000 acres here in dispute included the only land that was in dispute in the case of *Sharp & Stricker v. Learned*, 32 So. 2d 141, a case decided by the Supreme Court of the State of Mississippi in 1947, **which decision obviously precipitated the present suit.** Even though the Master held here that such decision was not binding on Louisiana, as Louisiana was not a party to such suit, **nevertheless, the Master adopted approximately the same boundary upstream from the island, as the Mississippi Supreme Court had fixed.** The opinion in that suit, on its face, indicates that the case turned on whether Diamond Island itself was in Louisiana or Mississippi, however, on analysis, it is seen from the opinion, that Sharp and Stricker, defendants in that suit, did not, at any time, claim the island, but only claimed those accretions in front of Sections 7, 8 and 9, Township 15 North, Range 14 East, Madison Parish, Louisiana, which accretions were upstream from the island and form part of said 3000 acres. The Mississippi Supreme Court's opinion "passed over" and did not mention, **though its decree covered**, how the boundary between the states could be extended upstream from the island for approximately a mile and a fraction. The opinion of the Mississippi lower court was affirmed by the cited opinion; and the lower court based its opinion as to the extension of the boundary upstream from the head of the island entirely on the testimony of the same Dr. Harold Fisk, who testified for the State of Mississippi in this case. Dr. Fisk there proposed that the boundary in the old channel, after the avulsion, **should be when 50% of the flow was still in the old channel** around the island. He did not then mention whether he intended low water or high water. Here are his exact words, taken from Complainant's Exhibit Fisk 4, at page 45 (R. 46), viz:

> "**Mississippi-Louisiana Boundary:** If the Mississippi-Louisiana boundary is to be determined by the thalweg of the Mississippi River then that line **should be established when more than 50% of the total flow of the river followed the course around Diamond Island.** The thalweg marking more than 50% of the flow is the thalweg of Course A_1. This thalweg is therefore presented as the logical position to arbitrarily establish the Louisiana-Mississippi boundary. . . . **The boundary is considered to follow the A_1 thalweg eastward around (actually he means upstream from) Diamond Island as far as the fork in the thalweg east of B. M. Diamond Island at point X** (Plate 10)." (Emphasis supplied)

It is important to note that this Course A_1 (50% flow) on Fisk's Plate 10 (Fisk No. 4, Plate 10—R. 46) is almost identical to the boundary line (old thalweg) as fixed by the Master. The length of the line from the head of Diamond Island upstream to "Point S" is approximately the same distance as Fisk's "Point X," which is where Fisk said the thalwegs "divided" (whatever that connotes) and the boundary should be fixed "**when more than 50% of the total flow of the river followed" this Course A_1 "around Diamond Island.**" That all important and decisive case by this Court of *Arkansas v. Tennessee*, supra, was not even mentioned by the Mississippi courts when they adopted **this 50% flow through the old channel** theory. It is obvious that **this 50% flow through the old channel** theory of Dr. Fisk which was adopted by the Mississippi courts is in conflict with the holding of this Court in *Arkansas v. Tennessee*, that,

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

The Mississippi Supreme Court gave as an additional reason in support of its decree in the cited case that Mississippi had always exercised dominion and control over this land, whereas Louisiana had exercised none. This reason is equally without merit, as not only the record in this case reveals, but as the Special Master so found (Report 45).

Of course, Dr. Fisk at the hearing attempted to give the same testimony that he had given in his report from which we have quoted, but on objection by the State of Louisiana that the fixing of the States' boundary by Dr. Fisk was an invasion of the Court's prerogative, which objection was maintained by the Master, Dr. Fisk, very conveniently, without explanation, changed to his Course A_2, marked on his map (Plate 10 to Fisk No. 4—R. 46), as "main water flow through cut-off" to what he said was the "last low water flow" around the island (referring to Plate 10 of Fisk 4, R. 157), in this way, viz:

> "A . . . . The portion of last low water flow through the island would be the position . . . marked by the brown line . . . ."

This brown line on Plate 10 of Fisk 4 (R. 46) is Course A_2 on Plate 10 and there marked "main water flow through cut-off." The phrase "main water flow" connotes that there was some other water flow if there was a "main" one, therefore, when Fisk labeled his chart "main water flow" he indicated that there was some flow in this Course A_2 in the old channel even though it was not the "main" flow. How then, did he switch, without explanation, and say that this same channel was **the last** low water flow, meaning when the water ceased to flow, when he had previously said it had a flow which was not the "main" flow? Furthermore, this Plate 10 shows a green line which is marked by Fisk on the plate as "1882-1883—Entire low water flow through cut-off," obviously meaning that the low water flow had ceased in the green channel, but there yet remained such a channel for other than such low water flow, as he shows.

The important point about this testimony of Fisk is that the green line around the island on Plate 10 of Fisk 4, is the exact location of the final thalweg as contended for by the State of Louisiana, that is, the location of the old channel around the island when that channel ceased to be a running stream and there was no more erosion and accretion taking place therein. This green line on Plate 10 of Fisk 4 was labeled by Fisk himself as "Entire low water flow through cut-off." To emphasize, Fisk, on Fisk 4, Plate 8 (R. 46), shows channel deterioration by stages, **and again shows the last channel around the island (as uncolored)**. This last channel is his green line on his Plate 10 of Fisk 4 (R. 46); moreover, this last channel is exactly in the position contended for by Louisiana under the law of the case of *Arkansas v. Tennessee*, supra.

All of this but points up the legal question at issue, that is, is the boundary around the island to be as the Master fixes it as remaining in the channel **only** until it **"can no longer be used for navigation" at low water stages** and so projected upstream for a mile and a fraction to a point where there was a speculated "Point of Divergence" or "divided thalweg" (whatever those terms connote in law); or is the boundary around the island to be as this Court decreed in *Arkansas v. Tennessee*, supra, to remain in the old channel,

> "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ."

and the head of the final thalweg of this old channel to be the point of beginning of the state's boundary fronting on the river at the time; with the law applicable to accretions to control the ownership of accretions in front or attached to the land as so divided by this final channel?

IV.

BOUNDARY IN OAK BEND APPLICABLE TO DIAMOND ISLAND TOWHEAD AREA

The legal question involved here is identical with the one involved in fixing the boundary around Diamond Island. The question is to locate the southern boundary of the accretions we have hereinabove discussed, which boundary is in that old channel of the Mississippi River known as Oak Bend. This Oak Bend was that part of the Mississippi River that separated the accretions on the right bank (Bedford Bar—Louisiana) from the left bank (Diamond Point—Mississippi). In 1933 a man-made avulsive cut-off was made at the neck of Diamond Point, called "Diamond Cut-off 1933" on all of the charts. This cut-off became the main channel, with Oak Bend as the "old channel."

In Part V of the Special Master's Report, page 52, the States' boundary, in part, was suggested, viz:

"Thence running westward along the dead thalweg of the abandoned channel of the Mississippi River (lower Oak Bend) to a point that is . . . (S-5 Smith Exhibit 5).

"Thence leaving the dead thalweg of **the abandoned channel of lower Oak Bend . . . .**" (Emphasis supplied)

Such fixing of the boundary in "Oak Bend" was also discussed by the Master in his report (Report 50), and is premised on the testimony of the witness Smith, viz:

"Q When was it that you said according to your information Oak Bend ceased to flow at low water?

"A- The records show that it ceased to flow first in the low water of 1939 . . . ." (R. 1467)

The witness Smith took the year 1939 "as the year to arrive at the boundary" in Oak Bend (R. 1468). Smith Exhibit No. 11 (R. 875) in the first two paragraphs, suggesting the "boundary of Diamond Point," are the same two paragraphs above quoted from the boundary suggested by the Master. The boundary so suggested by the witness was the channel of Oak Bend as it existed in 1939 because that was when a low water on some particular day did not flow in Oak Bend. Contrast the conclusion of the witness that the channel was abandoned because there was no low water flow therein for some few days, with the photograph of this same Oak Bend Island made in 1939, Louisiana Exhibit No. 44 (R. 1472). The witness Smith marked with red between the letters "A" and "B" on the 1939 photograph where he said the "dead thalweg" was located (R. 1471) on this photograph. This photograph was not at flood stage (R. 1472), yet, Oak Bend, as marked thereon by the witness, was apparently as large a channel of the Mississippi River as there existed in

that vicinity. This Oak Bend Channel was in 1939, and yet remains a running stream, which is changed each year by erosion and accretion, for in accordance with Louisiana Exhibit No. 45 (R. 1474), "Gage Readings for 1953" of the Mississippi River at the Vicksburg gage, as interpreted by the witness Smith, Oak Bend, in the relatively low water year 1953, was a running stream carrying the waters of the Mississippi River, for the period from February 19, 1953, through June 17, 1953. That this channel was a running stream subject to be **and being** changed by erosion and accretion after the year 1939 was graphically demonstrated under cross-examination by the witness Smith in his Louisiana Exhibit No. 46 (R. 1485) showing the migration of Oak Bend Channel. Even Smith's suggested boundaries on his exhibit, Smith No. 5 (R. 679), shows Bedford Bar extended across and beyond his "thalweg" that he said "died" in 1939, which extension was the result of the current in this Oak Bend running stream causing erosion and accretion. In accordance with Louisiana Exhibit No. 46 (R. 1485) and Smith's testimony, this line along Range 76 moved (channel migrated) **approximately 1400 feet** in a southerly direction.

The Master's legal conclusion on this channel in Oak Bend was, viz:

> ". . . the boundary became fixed in the middle of the thalweg of this channel as a result of the artificial avulsion caused by Diamond Cut-off when current ceased to flow in Oak Bend Channel by at least 1940. **Navigation could not use the channel at that time**, the water was stagnant in the old channel except in times of high water. It was no longer a part of the main river which continued to flow at all stages with a swift current through the cut-off carrying the commerce of the river.

> "While it is true that there has been some erosion by high water flow in the channel since 1940 to the extent of probably **⅓ of a mile**. I do not think that this has caused any change in the State boundary but is merely an effect of an avulsion." (Report 50)

What has navigation to do with a boundary becoming fixed in a channel? And what has low water, normal level of water, high water, or for that matter, flood water, to do with the legal issue? This Court has said that the legal question is "So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; . . . ." The Master differs, and disregards the decision of this Court, for he said that this erosion of ⅓ of a mile "has no effect." We submit that he is in error. *Arkansas v. Tennessee*, supra.

Conclusion as to Diamond Island Towhead Area

We submit that:

(1) The boundary in the old channel around Diamond Island should be fixed in the last channel, which was surveyed on the ground and shown in Louisiana Exhibit No. 36 (R. 1325), and the point shown thereon as the head of the final thalweg should be the upstream end of the island, the point where the boundary between the states in the old channel commences.

(2) On the disposition of the accretions formed in the vicinity of this Diamond Island Towhead and attached to Bedford Bar (Louisiana), which tailed down in front of

Diamond Island, we submit that all of them are in and form a part of the State of Louisiana.

(3) As the alternative claim of Louisiana on the disposition of the accretions formed in the vicinity of this Diamond Island Towhead, in the event that part of the same belong to Mississippi, because they were formed in front of Diamond Island, we submit that the same should be divided between the states on the right angle rule, to each known successive thalweg, starting at the point shown on Louisiana Exhibit No. 36 (R. 1325) as the head of the final thalweg in the old channel around the island.

(4) We submit that the southern boundary of the Diamond Island Towhead Area in Oak Bend Channel is yet a live channel and will remain so as long as it remains a running stream, and the boundary marked by it is subject to be changed by erosion and accretion.

PART B.

DIAMOND POINT AREA

Questions Presented for Review

1. The burden of proof to show which side the thalweg of a boundary stream an island is formed, being on the State of Mississippi in this case as plaintiff, and the evidence not only not showing which side of the thalweg of the boundary stream the island was formed, but the strongest evidence being that it probably was formed on the Louisiana side of such boundary thalweg, the Master erred in fixing the southerly boundary of Diamond Point as including this island.

2. Prescription is not applicable to the island, for first, it was only formed in approximately 1925, and there was no evidence of possession of the island itself in Mississippi as distinguished from Diamond Point, and the island is not a part of Diamond Point.

Statement of the Case as to the Diamond Point Area

The State of Louisiana, at the pre-trial conference at Birmingham, stipulated (Exhibit "B"—R. 4), viz:

> "Pursuant to authority of letter from Hon. Fred S. LeBlanc, Attorney General of the State of Louisiana, dated July 2, 1954, copy of which is annexed hereto, the State of Louisiana, by E. H. Lancaster and Ashton L. Stewart, Special Assistant Attorneys General, admits the area known as Diamond Point is not located within the State of Louisiana and Louisiana does not deny that this area is located in the State of Mississippi." (Tr. p. 8).

The authority to make such stipulation referred to therein and annexed thereto (Exhibit "B"—R. 4) contained the following limitation, viz:

> "It is understood, however, that no agreement, binding on the State of Louisiana or me, as Attorney General, shall be made on the basis of stipulations which undertake to fix the exact boundaries of the two states in, at or within the vicinity of Diamond Point, that question to be left open for additional stipulation, if possible, pursuant to an order that you might later make in that particular" (R. 11)

Therefore, in view of such stipulation, the location of the boundaries of Diamond Point was the only issue as to the Diamond Point feature of the case.

The location of the boundary between Diamond Point and Bedford Bar has been discussed hereinabove. The only other portion of the boundary that we need discuss is whether the Diamond Point boundary on the southerly side thereof includes or excludes the island that is shown in that locality on the 1930 panel of Mississippi River Commission chart—Fisk Exhibit No. 10 (R. 303) (which is also Fisk Exhibit No. 13—R. 315). **This is the island that was not colored by Fisk**, the principal witness relied on by Mississippi, **as being part of Diamond Point on the 1930 panel of Fisk No. 10** (R. 303).

Argument Applicable to Southern Boundary of Diamond Point

I.

BURDEN OF PROOF

The burden of proof here to show that this island was a part of Diamond Point was on the State of Mississippi. In a similar situation in the case of *Kansas v. Missouri*, 322 U.S. 213, 64 S.Ct. 975, 88 L.Ed. 1234, where the question was to which shore an island belonged, this Court said, viz:

> "Both by her position as complainant and on the facts, Kansas has the burden of proof in this case.
>
> ". . . .
>
> "The evidence on this controlling issue unfortunately is not as free from conflict or doubt as we might wish.

But it cannot be said, when account is taken of all the evidence, both oral and documentary, that a preponderance sustains Kansas' view that the main channel ever changed to the Missouri side. **Kansas' burden required preponderant proof. She has not made it."**

II.

MISSISSIPPI HAS NOT CARRIED BURDEN OF PROOF AS TO LOCATION OF ISLAND BELOW DIAMOND POINT

The Master, in holding that Mississippi had fulfilled the burden of proof, referred to Mr. Durham's testimony that he available maps showed the island on the Mississippi side of the thalweg (Report 48-49). But a review of Mr. Durham's estimony reveals that he also said such maps were not sufficient to show the situation at the time of the development of the island, **and were inconclusive as to the all important point as to where the thalweg was when the island first formed.** Mr. Durham interpreted these various maps (R. 1082-1102). The testimony of Mr. Durham gives this history indicating that the thalweg was north of the island (the Master having held it was south) when it was formed. First, the map evidence in 1913 (Mississippi River Commission, Chart No. 51), La. Exhibit No. 27, R. 1094, shows that there was not an island in this locality at such time—and as testified by Durham.

> "A . . . , the left bank is labeled 'bank caving, . . . , bank caving . . . .' " (R. 1094)

and he further says,

> "A . . . so that on the 1913 course, which makes a bend in the Newton Bend area, the thalweg is against the left bank in 1913."

The left bank at this point is the north bank. The next available map with complete data (R. 1086) is the Mississippi River Commission Survey in 1925-1926, Louisiana Exhibit No. 26, which, for the first time on any survey, shows the island in question. At this time, Durham interprets the map, showing two channels around the island,

> "In general, the deepest thalweg zone is to the south of the island in 1925-26." (R. 1092-3)

Then to show that the only evidence in the record indicates the island was first formed on the Louisiana side of the deepest thalweg, Durham says

> ". . . the channel to the north of the island is less well developed in 1929-30 (Louisiana Exhibit 25, R. 1085) than it is on this particular chart, the 1925-26 map' (La. Exhibit No. 26, R. 1086), so that interpretation would be that the channel to the north of the sand bar is in the process of abandonment whereas the channel to the south of the sand bar is taking the main flow." (R. 1087)

Then the witness referred to the only other information that was available, as to the location of the thalweg at the time this island was formed, and that information was a Mississippi River Commission Chart showing "Bank Lines, Mississippi River, Oak and Newtown Bends" (Louisiana Exhibit No. 28, R. 1095), which shows the bank lines between the period of 1913 and 1925 for the years 1920 and 1924, which information was not available on any other survey. This last chart, however, gave only bank line information and no other. The witness Durham testified of these bank lines, viz:

"A . . . . the left bank around Newtown Bend—was caving in 1913 and therefore retreating. By 1920, as indicated by this chart—(La. Exhibit No. 28, R. 1095)

"A —the left bank had retreated to this position—

"Q Which the witness marks or traces in lavender.

"A —and indicates the retreat of the bank. There was little additional retreat of the bank in the next four years. The left bank in 1924 I indicate in brown so that the main retreat in this area was accomplished in the interval between 1913 and 1920." (R. 1096)

Thus, the witness Durham demonstrates by Mississippi River Commission charts, that the north bank in the vicinity of the island was a retreating bank, at least through the time of the bank line survey of 1924 shown on La. Exhibit No. 28 (R. 1095); and the next map, 1925-26 survey, La. Exhibit No. 26 (R. 1086), shows the formation of the island with a thalweg on both sides; **but what is most significant is the 1926 bank line on La. Exhibit No. 28 (R. 1095), which shows that this left bank had suddenly (after the 1924 bank line survey and by the time of the 1925-26 survey) not only stopped retreating, but had become an advancing bank for a very considerable distance, even more advance than there had been retreat from 1913.** The next maps, especially the 1929-30 map, La. Exhibit No. 25 (R. 1085) shows the north channel around the island to be a closing channel. We submit that all of this information shows that Durham testified that the island was formed on the Louisiana side of the thalweg.

When the whole testimony of Durham and the maps are considered, the Master then had only the bare statement of Dr. Fisk that the island, in his opinion, was formed north of the thalweg (Report 49) as the only remaining evidence to bottom his opinion that the thalweg was north of the island when the island first formed. However, Fisk in marking his Exhibit No. 10 (R. 303) at another part of his testimony, **did not color the island as being in Diamond Point.** Thus, even Fisk's opinions conflicted. Furthermore, Fisk gave no reasons for either of his diverse opinions. And we submit that an opinion without reasons is of very little value. There were no other charts available to Fisk than to the witness Durham; therefore, we believe that the opinion of Fisk, given without reasons, on this point is not such evidence as will support the Master's findings, especially as the maps themselves prove otherwise.

But enough of what the Master said, let us turn to the evidence.

Aside from the normal migration and extension of Diamond Point, three natural events occurred which affect the establishment of its present boundaries. Consecutively, they are:

(1) The northwestward migration of the point until the river on its southwestward side broke or cut into the old Palmyra Channel, abandoned since the Davis Cut-off of 1867. This event is commonly referred to as the Killikranka Cut-off. (See 1913 chart on Fisk No. 10—R. 303)

(2) The formation of an island on the Louisiana side of

the then existing thalweg in the channel of the river south of Diamond Point prior to 1926, and the subsequent abandonment of the former main channel between this island and Diamond Point.

(3) The dredging of an artificial cut-off across the eastern neck of Diamond Point in 1933, and the simultaneous closing of the channel south of Diamond Point by dikes.

The Killikranka Cut-off in 1904 allowed the diversion of a portion of the normal river flow around Davis Island to the west through the old Palmyra Channel; **this reduced the flow of water through the regular channel downstream from the Killikranka breakthrough, along the south side of Diamond Point.** As Diamond Point migrated progressively westward, changes in alignment of the Oak Bend Channel to Palmyra Channel, which it intersected, became more advantageous to greater flow through Palmyra Channel and reduced flow through the channel around Newtown Bend, south of Diamond Point.

One of the results of this reduced flow was the formation of an island bar about 1925 (Report 48) (La. Exhibits 26 and 26-A—R. 1086) in the river **south of the thalweg or boundary channel**, as it had clearly existed up to that time. Another result was the left bank stopped retreating and advanced. Louisiana contends that this island initially formed on the Louisiana side of the existing thalweg, therefore, it is not a part of Diamond Point, but to the contrary, belongs to the State of Louisiana. The pertinent charts demonstrating that this island formed south of the boundary thalweg are:

Mississippi River Commission Chart No. 51 (Complainant's Exhibit 12—R. 110).

Mississippi River Commission Chart No. 2181, Sheet 67, showing bank line surveys of 1913, 1920, 1924, 1926 and 1929 in the pertinent area (Louisiana Exhibit No. 28—R. 1095).

Mississippi River Commission Hydrographic Survey, Field Sheets No. 91 and 93, 1925-25 (Louisiana Exhibits No. 26 and 26a respectively—R. 1086).

U. S. Engineers, Second District, New Orleans, Low Water Survey 1929-30, Sheets 10 and 11 (Louisiana Exhibits No. 25a and 25 respectively—R. 1085).

U. S. Engineers, Second District, New Orleans Hydrographic Survey, 1932-33, Sheet 8 (Louisiana Exhibit No. 29—R. 1101).

The 1913-15 chart (Complainant No. 12—R. 110) shows the Diamond Point left bank caving in the vicinity of Newtown Bend along the outside of the meander. **The data shows the thalweg is against the caving, or Mississippi, side of the stream as would be expected in such a situation. This is the only thalweg present and would, therefore, mark the boundary line at that time.** The 1920 and 1924 bank lines (on Louisiana Exhibit No. 28—R. 1095), **show continued bank retreat in the area.** Although no hydrographic data is available to substantiate the fact, **the thalweg undoubtedly remained adjacent to this north or left bank under such a situation, which is the normal situation**, because the bank was retreating at such place.

The next available evidence, the hydrographic chart of 1925-26 (Louisiana Exhibit No. 26 and 26a—R. 1086), shows this boundary thalweg still adjacent to the north, or Mississippi, bank of the channel through the Newtown Bend area.

It also depicts an island sand bar **south of this established boundary thalweg** and a new thalweg formed to the south of this island. On this map, the two channels are virtually of equal depth, but with the new southern thalweg slightly deeper and undoubtedly carrying slightly more flow than the boundary thalweg. **The most significant fact on this bank line survey (La. Exhibit No. 28—R. 1095), however, is that the bank in 1925-26 had not only stopped retreating, but had advanced to beyond where the 1913 bank had been. This was sudden; and at the same time the island formed.**

The next map, 1929-30 (Louisiana Exhibit No. 25 and 25a—R. 1085), shows a considerable enlargement of the sand bar island and the adoption of the southern channel as the main flow, to the virtual abandonment of the original north channel in which Louisiana contends the state boundary still remained.

The causative factor, in the sudden change from a retreating to an advancing bank, and in the formation of the island south of the original river main channel, and the subsequent adoption of the new channel to the south of the island, is the deflection of a greater flow of water down the Palmyra Channel to the west around Davis Island. The consequent reduced flow south of Diamond Point around Newtown Bend tended to seek a course with meanders of tighter curvature, thus causing the island to be formed and the abandonment of the old north thalweg around the island and the adoption of a new southern channel within the span of years from 1924 to 1930. The left bank line was also stopped from retreating and caused to advance.

Louisiana contends **that the north channel was the only thalweg position on the 1913 chart and remained so until**

1924-25, when the left bank stopped retreating and advanced, and at the same time the island formed. After the formation of the island and the subsequent new southern thalweg, **the boundary between Louisiana and Mississippi remained in the original thalweg to the north of the island.** Consequently, the island and the new thalweg are within the State of Louisiana inasmuch as the state boundary has remained in the position of the final channel to the north side of the island **when the waters therein last closed to flow**. This last channel can easily be traced in the field or on maps today, Generally speaking, it lies as marked (R. 454) by complainant's witness, Hyland, by a red line on Complainant's Exhibit No. 25 (R. 110). It also lies between the Diamond Point area shaded by complainant's witness, Fisk, in pink and the offshore island to the south on the 1930 panel of Fisk No. 10 (R. 303); it is marked also by Defendant's witness, Durham, on the 1932-33 hydrographic chart (Louisiana Exhibit No. 29—R. 1101) by a red line labeled "B".

The boundary of Diamond Point has become stationary in successive segments. The thalweg marking the boundary immediately north and southwest of Newtown Bend was final by the formation of an island south of this thalweg, within Louisiana, and the subsequent abandonment by 1930 of the boundary thalweg so that it yet remains traceable in the field. Construction of a dike along the lower reaches of the new southern channel, soon after dredging of Diamond Cut-off in 1933, caused cessation of flow entirely south of Diamond Point. At that time, the river segment referred to as Kellogg's Lake in the testimony became abandoned from the head of the previously abandoned channel north of the island upstream to the point where the channel split to course down both Palmyra and Kellogg's Lake.

Subsequent to this event in 1933, Oak Bend Channel north of Diamond Point has been in the process of abandonment. The latest Oak Bend course shown on an official map, the aerial photograph mosaic of December, 1953 (Sessions No. 1—R. 371) is clearly shown on that map. Also, the abandoned channels south of Diamond Point are also clearly indicated. Louisiana holds, however, that the boundary segment from the main Mississippi River at the head of Diamond Cut-off downstream to the head of Kellogg Lake, which is the northern boundary of Diamond Point, is still a live and moving thalweg, although in the final stages of abandonment. This segment has been traced in red as it existed in December, 1953, by witness Durham on the aerial photograph mosaic of December, 1953. (Sessions No. 1—R. 371).

If map evidence had been available covering the period of the first formation of this island south of Diamond Point in Newtown Bend, then it would be clear as to which side of the island it was when the island first began to form, but no such map was offered in evidence.

The situation then, is that the map evidence prior to the formation of the island shows the thalweg, in the place where the island formed, on the north side of the channel. The next map shows a divided flow with a slightly greater flow to the south of the island. Later maps show the north channel finally abandoned. In other words, the map evidence is that of a closing channel on the north side of the island. **But the most significant evidence is that revealed by the bank lines chart, La. Exhibit No. 28 (R. 1095), which shows the left bank retreating in 1920 and 1924, and by 1925-26, when the island is first shown, this left bank after the 1924 survey, and on the 1925-26 survey, was advancing, and not retreating.**

Under such circumstances, the maps tell the story of the main thalweg being to the north of the island when the island was first formed. This was backed up by the testimony of the witness presented by the State of Mississippi, Mr. John L. Hyland (R. 454) when he excluded this island in indicating Diamond Point on Complainant's Exhibit No. 25 (R. 454).

Mississippi had the burden of proof, and it has failed to maintain it; we submit that the evidence shows the island in Louisiana.

Accordingly, we submit that the boundary of Diamond Point in this area is north of the island—and though such channel has now been abandoned, it is easily traceable in the field and on maps, and can be surveyed.

III.

POSSESSION

The Master stated that the prescription claim of more than 50 years to Diamond Point was good. He obviously was not referring to this small island, which first appeared on maps in 1925-26 (Louisiana Exhibit No. 26—R. 1086) and was still an island in 1930 (Louisiana Exhibit No. 25—R. 1085). There were no acts of possession shown on this particular island by the evidence, though it is now attached to Diamond Point, a part of Mississippi, and to Sargent's Point, a part of Louisiana. The many witnesses for the State of Mississippi who testified, at no time singled out this island as having been possessed by Mississippi—they all spoke of Diamond Point being possessed. We submit that prescription is not applicable to this island, as it was never a part of Diamond Point.

Conclusion as to Diamond Point Area

We submit that this island is part of Louisiana, and that the boundary in the now abandoned channel to the north of the island is readily traceable in the field and on maps and should be fixed by a survey, as the boundary between the states in this Diamond Point Area.

Respectfully submitted,

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CERTIFICATE

This is to certify that copies of the foregoing brief have been served upon counsel of record of the State of Mississippi by mail, deposited in a United States mail box, with first class postage prepaid, addressed to counsel of record of the State of Mississippi at the post office address listed.

Baton Rouge, Louisiana, May 6, 1955.

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